Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link Up	)	WC Docket No. 03-109
	)	
Universal Service Contribution Methodology	)	WC Docket No. 06-122
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)))	CC Docket No. 96-98
	)	
Developing a Unified Intercarrier Compensation Regime	))	CC Docket No. 01-92
	)	
Intercarrier Compensation for ISP-Bound Traffic	))	CC Docket No. 99-68
	)	
IP-Enabled Services	)	WC Docket No. 04-36
	)	
Numbering Resource Optimization	)	CC Docket No. 99-200

COMMENTS OF THE
NATIONAL EXCHANGE CARRIER ASSOCIATION, Inc.

November 26, 2008

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I. INTRODUCTION AND SUMMARY.

On November 5, 2008 the Commission adopted an Order on Remand and Report and Order and Further Notice of Proposed Rulemaking in the above-captioned matters.[1]

[1] *High-Cost Universal Service Support*, WC Docket No. 05-337, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Lifeline and Link Up*, WC Docket No. 03-109, *Universal Service Contribution Methodology*, WC Docket No. 06-122, *Numbering Resource Optimization,* CC Docket No. 99-200, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, *IP-Enabled Services*, WC Docket No. 04-36, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, FCC 08-262 (rel. Nov. 5, 2008) (*Further Notice*).

In these Comments, the National Exchange Carrier Association, Inc. (NECA) addresses various issues raised in the Commission's *Further Notice* with respect to Intercarrier Compensation (ICC) and Universal Service Fund (USF) reform.

NECA supports prompt action on the "growing consensus" items outlined in the Joint Statement of Commissioners Copps, Adelstein, Tate and McDowell.[2] Such reform could, as the *Joint Statement* suggests:

- Move intrastate access rates to interstate access levels over a reasonable period of time using an alternative cost recovery mechanism for companies impacted by rate reform;
- Impose moderate increases in subscriber line charges in conjunction with a federal benchmark mechanism;
- Address phantom traffic and access pumping problems by adopting the call signaling and financial responsibility rules proposed in the *Further Notice*, and by using the Commission's authority under section 205 of the Act, as well as reasonable certification requirements, to assure access rates reflect demand levels;
- Resolve access avoidance problems by confirming interconnected VoIP services are subject to the same intercarrier compensation obligations as other voice telephony services;
- Encourage carriers to deploy broadband services throughout their service territories by matching deployment commitments with a commitment to continued rate-of-return based funding; and
- Replace the current irrational identical support rule for competitive eligible telecommunications carriers (CETCs) with cost-based support targeted to rural and high-cost areas.

These reforms, which could be accomplished by the Commission before the end of the year, would constitute a remarkable regulatory achievement by any standard. They would also provide a firm and legally-sustainable foundation for additional reform measures tailored to meet the broadband needs of 21st Century consumers in high-cost and rural areas.

[2] *Order on Remand*, Joint Statement of Commissioners Michael J. Copps, Jonathan S. Adelstein, Deborah Taylor Tate and Robert M. McDowell (*Joint Statement)*.

In contrast, adoption of the radical, and in some cases punitive, actions proposed in portions of the Commission's *Further Notice* would likely insure a continuing legacy of litigation and discord, and make it impossible to achieve our nation's broadband deployment goals in the foreseeable future. In particular, the Commission should not:

- Impose study-area specific caps or freezes on universal service support to rate of return (RoR) ILECs, as such caps are fundamentally inconsistent with rate of return regulation;
- Employ reverse auctions as a means of determining eligibility for universal service support;
- Improperly classify any IP/PSTN services as information services without considering the nature of specific services offered;
- Impose a new, untested "additional costs" standard that produces unreasonably low rates for rural RoR carriers;
- Adopt unduly harsh rules requiring carriers to charge uniform state-wide rates that fail to reflect the network costs of individual companies; or
- Require implementation of rate reductions or other reforms until actual rules governing replacement support mechanisms are in place.

In sum, NECA strongly urges the Commission to follow the course towards unification of interstate and intrastate access charges and reform of USF mechanisms outlined in the *Joint Statement* of Commissioners Copps, Adelstein, Tate and McDowell. NECA further suggests the Commission refer to later proceedings issues relating to unification of reciprocal compensation rates and access charges. Such proceedings should also focus on developing sustainable network interconnection, pricing and universal service rules for the multi-service and all-packet broadband networks that are being deployed today.

II. THE COMMISSION SHOULD FOLLOW THE "GROWING CONSENSUS" APPROACH TO REFORM DESCRIBED IN THE JOINT STATEMENT OF COMMISSIONERS COPPS, ADELSTEIN, TATE AND McDOWELL.

In their *Joint Statement* appended to the Commission's *Further Notice,* Commissioners Copps, Adelstein, Tate and McDowell express their support for comprehensive reform of the intercarrier compensation and universal service systems in an expedited fashion, and express their belief there is a "tentative but growing measure of consensus" on a number of specific reform proposals, including:

> moving intrastate access rates to interstate access levels over a reasonable period of time; not unduly burdening consumers with increases in their rates untethered to reductions in access charges; addressing phantom traffic and traffic stimulation; implementing an alternative cost recovery mechanism in certain circumstances; eliminating the identical support rule and moving over time towards support based on a company's own costs; emphasizing the importance of broadband to the future of universal service; and clarifying the implementation of the Alaska Native regions and tribal lands exception to the CETC cap adopted on May 1, 2008, and the need for special consideration for such areas. [3]

The Joint Statement requests stakeholders' "attention to these issues of concern and consideration of whether modifications along these lines to the attached proposals are warranted."[4]

NECA supports Commission action on the consensus proposals outlined in the *Joint Statement.* In the following pages NECA describes specific steps the Commission can take in the current year to accomplish these consensus proposals.

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[3] *Id.*

[4] *Id.*

A. The Commission Should Accomplish Unification of Intrastate and Interstate Access Rates on a Voluntary Basis, Using Federal Restructure Mechanism Funding as an Incentive.

As a critical first step towards comprehensive ICC reform, the Commission should promptly adopt rules permitting rural RoR carriers to move their intrastate originating and terminating access rates to capped interstate levels, using a restructure mechanism that maintains interstate switched access cost recovery and provides for intrastate revenue recovery. [5]

Permitting carriers and state commissions to reduce intrastate access rates to interstate levels on a voluntary basis would eliminate a major source of rate arbitrage. This approach also avoids legal issues likely to arise with any attempt by the Commission to preempt state regulation of intrastate access charges[6] or to force carriers to adopt a single uniform rate based on a new, untested additional costs standard.[7] Once interstate

[5] An approach for such a mechanism was proposed in the *Missoula Plan. See* Letter from Tony Clark, Commissioner and Chair, NARUC Committee on Telecommunications, Ray Baum, Commissioner and Chair, NARUC Task Force, and Larry Landis, Commissioner and Vice-Chair, NARUC Task Force, CC Docket No. 01-92 (July 24, 2006), at 2 (*Missoula Plan*). Similar plans have been presented in a number of other *ex parte* filings over the past six months. For example, in September the Rural Alliance described an interim reform approach that would permit rural RoR (ILECs to reduce intrastate rates to interstate levels, with resulting revenue shortfalls above a federal benchmark recovered from a Restructure Mechanism. Letter from Tom Karalis, Fred Williamson & Associates, to Marlene H. Dortch, FCC, CC Docket No. 01-92 (Sept. 26, 2008), at 7 (filed on behalf of the Rural Alliance, *et al*.) (*Rural Alliance*). Similarly, a recent Verizon *ex parte* described how RoR ILECs could calculate Replacement Mechanism support each year as a residual, equal to the difference between the ILEC's switched access revenue requirement and the ILEC's revenue from intercarrier charges (net of intercarrier compensation payments to other carriers), maximum incremental SLC revenues, and Local Switching Support ("LSS"). Under Verizon's proposal, the ILEC's switched access revenue requirement is the sum of its interstate switched access revenue requirement, calculated each year at the Commission's prescribed rate of return of 11.25 percent, its base period intrastate switched access revenue, and base period reciprocal compensation revenue net of reciprocal compensation expenses. *See* Letter from Suzanne E. Guyer, Verizon, to Chairman Martin and Commissioners Copps, Adelstein, McDowell, and Tate, CC Docket Nos. 01-92 and 96-45 (Sept. 12, 2008), at 8.

[6] *E.g.*, Letter from Daniel Mitchell, NTCA, to Marlene H. Dortch, FCC, CC Docket No. 01-92 (Sept. 30, 2008), at 2; Letter from Tamar E. Finn, Bingham McCutchen, LLP (on behalf of Earthlink, et al.), to Marlene H. Dortch, FCC, CC Docket No. 01-92 (Oct. 20, 2008), at 10.

[7] As discussed below, the proposed "additional costs" standard raises a number of concerns. *See infra*, p. 24, Section III.B.

and intrastate access charges are unified, methods to conform interconnection rates for local interconnection under section 251(b)(5) can be examined more carefully in a further proceeding.

B. Increases in End User Rates Should Be Moderate and Based on a Reasonable Federal Benchmark.

The *Further Notice* proposes various increases in federal subscriber line charge (SLC) cap levels as a means of recovering lost revenues attributable to intercarrier compensation reform. Under the *Further Notice*, caps on interstate SLCs for residential and single line business customers would be raised from $6.50 to $8.00; from $7.00 to $8.50 for non-primary residential lines, and from $9.20 to $11.50 for multi-line businesses.[8]

The *Further Notice* also proposes that the Separations Joint Board consider issues related to additional SLC cap increases, including whether such increases should be set at a fixed amount to cover net losses in intercarrier revenues, whether a "flexible" SLC cap should be used in conjunction with an overall benchmark, or some combination of these options.[9]

Moderate increases in SLC caps appear to be a reasonable way to permit carriers to recover some revenues not otherwise available from intercarrier compensation charges. Such increases should, however, be prescribed in conjunction with a federal benchmark mechanism (FBM) that establishes an affordable ceiling (*e.g.*, $25 per month) for basic local telephone service charges, including monthly local service rates, federal SLCs, state SLCs, any mandatory EAS additives, USF contributions and mandatory charges such as

[8] *Further Notice,* Appendix A, ¶ 298.

[9] *Id.* at ¶ 305.

TRS assessments. Failure to establish such a benchmark mechanism may in some cases cause local telephone service charges to exceed the "comparable rate" requirement of section 254 of the Act, as well as disadvantage early adopter states (*i.e.*, states that have previously implemented ICC reform).[10] Thus, should the Commission decide to implement increases in SLC caps as a means of partially recovering lost ICC revenues, it should do so in conjunction with a replacement funding mechanism that incorporates an FBM.

C. The Commission Should Address Phantom Traffic and Access Pumping Issues by Adopting Reasonable Regulatory Measures.

The Commission proposes to modify its rules to require all service providers to populate Calling Party Number (CPN) information in the SS7 call signaling stream, and to prohibit them from stripping or altering this information.[11] The Commission also proposes to expand the scope of its existing rules, which currently apply only to service providers using SS7 and only to interstate traffic, to all traffic originating or terminating on the PSTN, including jurisdictionally intrastate traffic.[12]

The *Further Notice* also proposes to clarify that only the Charge Number (CN) (i.e., the number to be billed for the call) can be used to populate the CN field, consistent

[10] An example of such a federal benchmark mechanism was added to the Missoula Plan in 2007. *See* Letter from Peter Bluhm, Esq., Vermont Public Service Board; Christopher Campbell, Vermont Department of Public Service; Steve Furtney, Wyoming Public Service Commission; Angela DuVall Melton, Esq., Nebraska Public Service Commission; Joel Shifman, Esq., Maine Public Utilities Commission; Joseph Sutherland, Indiana State Regulatory Commission; and the Supporters of the Missoula Plan to Marlene H. Dortch, FCC, CC Docket No. 01-92 (Jan. 30, 2007) (*FBM*).

[11] *Further Notice,* Appendix A, ¶ 333.

[12] This would include a requirement for service providers using MF signaling to pass CPN information, or the Charge Number (CN) if it differs from the CPN, in the Multi Frequency Automatic Number Identification (MF ANI) field.

with industry standards.[13] The Commission will allow only very limited exceptions to these new rules (*e.g.*, in situations where industry standards permit, or even require, some alterations in signaling information). Existing exemptions set forth in the current call signaling rule (47 C.F.R. § 64.1601(d)) would remain in place as well.[14]

NECA encourages the Commission to adopt these proposed new call signaling rules expeditiously. As NECA pointed out in its January 2008 *Petition for Interim Order*,[15] consumers, interconnected carriers, emergency service providers, and law enforcement officials share a common interest in the accuracy of this data. Whether due to access arbitrage schemes, technical problems in networks or Caller ID "spoofing", an increasing number of calls arrive without valid CPN information. Immediate action by the Commission to adopt expanded call signaling rules will not only be helpful for carriers attempting to deal with phantom traffic, but will also alleviate concerns expressed by Congress and others over problems caused by missing or inaccurate call signaling information.[16]

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[13] *Further Notice,* Appendix A, ¶ 333.

[14] *Id.* at ¶ 335.

[15] NECA Petition for Interim Order, CC Docket No. 01-92 (Jan. 22, 2008), at 2 (*NECA Petition for Interim Order*).

[16] *E.g.*, Truth in Caller ID Act of 2007, H.R. 251, 110th Cong.; Truth in Caller ID Act of 2007, S. 704, 110th Cong. The Senate bill defines caller identification information to include the telephone number of, or other information regarding the origination of, a call made using a telecommunications service or IP-enabled voice service, and defines `IP-enabled voice service' as the provision of real-time 2-way voice communications offered to the public transmitted through customer premises equipment using TCP/IP protocol for a fee (whether part of a bundle of services or separately) with interconnection capability such that the service can originate traffic to, or terminate traffic from, the public switched telephone network. *See also*, Written Statement of Kris Anne Monteith, Chief, Enforcement Bureau, FCC, on Caller ID Spoofing, Before the Committee on Commerce, Science, and Transportation, U.S. Senate (June 21, 2007), http://www.fcc.gov/eb/speeches/kris070621.pdf ,and Testimony of the Honorable Ron Jones, Commissioner, Tennessee Regulatory Authority, on Caller ID Spoofing, Before the Committee on Commerce, Science, and Transportation, U.S. Senate (June 21, 2007), http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=1878&Witness_ID=6656**.**

NECA further encourages the Commission, when writing new rules, to make clear (as it did in its 2006 Pre-Paid Calling Card Order[17]) that CPN transmitted in the signal must reflect the true 10-digit telephone number of the individual end-user customer originating the call, and not a number associated with intermediate switches, gateways, or "platforms" used to access the PSTN.[18]

Rural carriers are also heartened to see the Commission propose to establish payment obligations for service providers who send traffic lacking the information required by amended call signaling rules, or who do not otherwise provide required billing information to the terminating carrier.[19] In these instances, the Commission proposes to require intermediate service providers to pay the terminating service provider's highest termination rate in effect at the time the traffic is delivered to the terminating service provider. [20]

Importantly, the Commission makes clear it intends these new rules to apply to "any service provider, not just a provider who stripped or altered traffic signaling, who is not taking steps to ensure that traffic carried on their network is properly labeled and identifiable."[21]

These new rules will greatly assist rural carriers in billing and collecting lawful termination charges for traffic heretofore terminated essentially free-of-charge. As NECA and others have pointed out, this can represent 20% or more of some carriers'

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[17] *Regulation of Prepaid Calling Card Services*, WC Docket No. 05-68, Declaratory Ruling and Report and Order, 21 FCC Rcd 7290 (2006), at ¶¶ 33-34 (*2006 Pre-Paid Calling Card Order*).

[18] *Id. See also NECA Petition for Interim Order* at 2, 5, 15.

[19] *Further Notice,* Appendix A, ¶ 337.

[20] *Id.*

[21] *Further Notice*, Appendix A, ¶ 341. The Commission also proposes to "permit those intermediate service providers, in turn, to pass along the termination charges to the provider that delivered the applicable traffic to them, in addition to any otherwise-applicable charge for their services." *Id.* at ¶ 338.

total terminating traffic.[22] The "financial responsibilities" rule is particularly important given an ever-increasing portion of CLEC traffic sent over local interconnection circuits for termination is, in fact, interexchange traffic lacking sufficient billing information. A number of CLECs have disputed their liability for payment for this traffic. A rule clarifying financial responsibility will not only reduce the amount of unbillable/uncollectible traffic but also the number of disputes before courts and PUCs.

The Commission can also help resolve billing disputes by confirming carriers may apply the "telephone numbers rule" proposed in NECA's *Petition for Interim Order*.[23] This methodology, which permits carriers to use the originating and terminating telephone numbers associated with a call to determine jurisdiction for billing purposes, would apply on a default basis in instances where sending carriers refuse to provide reasonable billing factors or cannot provide information regarding the actual origination points of calls (*e.g.*, cell site identification data).[24]

Finally, NECA continues to recommend the Commission address "access pumping" problems by instituting reasonable measures targeted at the source of the problem. In comments submitted in WC Docket No. 07-135, NECA explained that section 205 of the Act grants the Commission ample authority to investigate the lawfulness of effective tariffs. [25] In the event a company fails to revise rates when

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[22] *See, e.g.,* Letter from Karen Brinkmann, Latham & Watkins, to Marlene H. Dortch, FCC, CC Docket No. 01-92 (July 1, 2005), attaching presentation entitled "Phantom Traffic: Problem and Solutions", Balhoff & Rowe, May 2005.

[23] *NECA Petition for Interim Order,* at 16.

[24] *Id.* at 18, n. 17. NECA acknowledges the numerous disputes being addressed by states over the appropriate intercarrier compensation for calls to telephone numbers that are routed outside their original rate centers (VNXX calls). Where the actual geographic end points of calls are known, however, there would not appear to be a need to rely on the telephone numbers rule as a default mechanism.

[25] NECA Comments, WC Docket No. 07-135 (Dec. 17, 2007), at 11.

demand conditions change, section 205 fully authorizes the Commission to find a specific tariff unlawful and to prescribe lawful rates prospectively. In addition, NECA suggested the Commission give consideration to imposing reasonable additional certification requirements and revising its rules governing carrier representations, as described in the Commission's *Access Pumping NPRM*.[26] These measures should be sufficient to assure access rates are reasonable and resolve instances of alleged "access pumping" by a few carriers without imposing draconian rate reductions on carriers not involved in such activities.[27]

D. The Commission Should Confirm Interconnected VoIP Calls Are Subject to the Same Intercarrier Compensation Obligations as All Other Voice Traffic.

Improved signaling rules, and rules clarifying payment responsibility for unidentified traffic, will assist greatly in resolving "phantom traffic" issues. Alarmingly, however, the *Further Notice* proposes to classify all IP/PSTN traffic as "information services."[28] This conclusion, if adopted by the Commission, would seemingly permit service providers to claim their traffic is exempt from access charges under the "ESP exemption." At the same time, the *Further Notice* states that the "status quo" continues to apply to calls using VoIP technology.[29] It is thus unclear whether interconnected interexchange VoIP calls, which use the network in exactly the same way as traditional

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[26] *Id.* at 10-11.

[27] NECA member companies report instances where some interexchange carriers (IXCs) have refused to pay current, valid access bills based on claims the ILEC is engaged in "access pumping." In some cases, these carriers have long ceased to participate in so-called "pumping" arrangements. In other cases, it appears these carriers are being short-changed on bills for traffic terminated to ordinary high-volume users that may have no valid association with so-called "pumping" arrangements. The Commission should make clear access customers are not entitled to refuse payment of legitimate access bills simply by claiming "access pumping" is involved.

[28] *Further Notice,* Appendix A, ¶ 209.

[29] *Id.* at n. 564.

long-distance telephone calls, will be required to pay access charges, reciprocal compensation charges, or no charges at all.

In Section III.C. of these comments, NECA explains the Commission's proposed order classifying all IP/PSTN services as "information services" would almost certainly be overturned by a reviewing court as arbitrary and capricious.[30] Rather than reach an improper and unsupportable classification decision, the Commission should instead confirm what is obviously true: interconnected VoIP services that rely on North American Numbering Plan (NANP) numbers to provide local and long-distance voice calling are telecommunications services, and should be subject to the same intercarrier compensation obligations – including payment of access charges – as any other traffic using the PSTN. This straightforward finding would put an end to the constant disputes plaguing the industry over access charge bills for interexchange calls, and resolve a principal source of uneconomic rate arbitrage.[31]

Even if the Commission were somehow to find all IP/PSTN services (including services like interconnected VoIP that rely on North American Numbering Plan (NANP) numbers and enable users to make ordinary local and long-distance voice telephone calls) to be "information services", it should confirm such services should pay the same intercarrier compensation obligations

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[30] *See infra,* pp. 29-37.

[31] *See e.g.,* Letter from Joe A. Douglas, NECA, to Marlene H. Dortch, FCC. WC Docket No. 04-36, CC Docket No. 01-92 (May 23, 2008); Letter from Joe A. Douglas, NECA, to Kevin J. Martin, Chairman, FCC, CC Docket No. Docket No. 01-92 (Nov. 13, 2007); Letters from Joe. A. Douglas, NECA, to Marlene H. Dortch, FCC, CC Docket No. Docket No. 01-92 (Oct. 16, 2007 and May 2, 2007). *See also*, Letter from Stuart Polikoff, OPASTCO, to Marlene H. Dortch, FCC, WC Docket Nos. 05-337, 06-122, 04-36 and CC Docket Nos. 96-45 and 01-92 (Sept. 16, 2008); Letter from Daniel Mitchell, NTCA, to Marlene H. Dortch, FCC, CC Docket No. 01-92 and WC Docket No. 04-36, (Sept. 30, 2008); Letter from Curt Stamp, ITTA, to Marlene H. Dortch, FCC, CC Docket No. 01-92 and WC Docket No. 04-36 (Aug. 14, 1008).

as other voice telephony services. Contrary to claims by interconnected VoIP providers, this would do nothing to "stifle innovation" but would simply mean all voice service providers would compete on a level playing field.[32]

E. The Commission Should Match Carrier Commitments to Universal Broadband Deployment with a Renewed Regulatory Commitment to RoR-Based Funding.

The *Further Notice* proposes requiring carriers to commit to universal deployment of broadband Internet access services as a condition of receiving frozen, study area-specific Universal Service support.[33] Should carriers fail to make this commitment, or fail to deliver universal broadband Internet access as promised, the Commission would conduct reverse auctions to appoint another provider to receive Universal Service support.[34]

Rural RoR carriers are already making significant efforts to deploy broadband-capable networks throughout most portions of their service territories.[35] Investing in the equipment needed to reach remaining customer locations will, however, require significant additional financial commitments. While broadband commitments may be a

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[32] The Commission should also make clear that when wholesale transmission providers deliver traffic for termination to the PSTN, they are responsible for payment of access charges. *See Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55, Memorandum Opinion and Order, 22 FCC Rcd 3513 (2007).

[33] *Further Notice,* Appendix A, ¶ 30.

[34] *Id.* at ¶ 31.

[35] NECA periodically conducts surveys of its member companies to track the progress of network technology deployment. These surveys show that NECA members are being successful in rolling out advanced services at a pace rivaling much larger companies. NECA's 2007 *Trends* survey, for example, shows that 1,080 of NECA's traffic sensitive (TS) pool members serve over 1.3 million DSL lines. This has grown from 151 TS pool members serving 20,000 DSL lines in 1999. Rural ILECs have been able to achieve these deployment levels in part due to current Universal Service support mechanisms as well as existing intercarrier compensation systems. Overall broadband availability to customers served by TS pool members reached 92 percent in 2008. The FCC estimates the national average broadband penetration rate is about 82 percent. *See* FCC Industry Analysis and Technology Division, "High-Speed Services for Internet Access: Status as of June 30, 2007" (Mar. 2008), at 3.

reasonable way to galvanize further action by RoR carriers, such commitments must be matched by a renewed regulatory commitment to continued availability of high cost Universal Service support on an "as invested" basis. That is, RoR carriers must continue to have reasonable assurance that costs actually incurred to serve rural customers will be recoverable through some combination of reasonable end user and intercarrier charges, as well as RoR-based Universal Service funding.[36]

Unfortunately, this does not appear to be the approach taken by the *Further Notice*. As noted above, the *Further Notice* proposes substantial reductions in intercarrier compensation levels. As intercarrier revenues are reduced, RoR companies must increasingly rely on Universal Service funding for cost recovery. Yet, the *Further Notice* proposes to cap overall levels of high cost funding and impose study-area specific freezes on high cost support going forward.

Study area-specific freezes on Universal Service support will, in effect, eliminate rate of return regulation and likely make it impossible for most RoR companies to commit to universal deployment goals or to acquire the necessary financing to meet broadband deployment commitments if made. As discussed below, mandatory uniform below-cost rates and study area support freezes may also unlawfully foreclose all opportunities for RoR carriers to earn their authorized rate of return.[37] As such, the proposed plan not only appears arbitrary and capricious on its face (*i.e.*, how can the Commission demand additional broadband deployment while simultaneously cutting intercarrier compensation rates and freezing the Universal Service funds (ICLS and High-

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[36] *E.g.*, Letter from Robert F. West, CoBank, to Marlene H. Dortch, FCC, CC Docket No. 01-92 (Apr. 28, 2008).

[37] *See infra*, p. 20, Section III A.

cost Loop) specifically associated with loop distribution plant required to deploy broadband?), but raises serious constitutional questions as well.[38]

Assuming the Commission wishes to obtain commitments from RoR carriers to deploy universal broadband services, and is willing to commit to maintaining RoR-based cost recovery for actual network investments, minimum speed requirements must be reasonable, and carriers must be permitted to use all available technical solutions to deploy broadband, including satellite service for customers in hard-to-serve remote locations.[39] Before requiring such commitments, the Commission would also need to address whether it has the statutory authority to require telecommunications carriers to provide unregulated broadband Internet access service as a condition of receiving Universal Service support under section 254 of the Act.[40]

In order to accomplish universal availability of broadband Internet access service, it may also be necessary to consider mechanisms to help recover the high costs of obtaining transport to the Internet backbone from rural areas. As the Joint Board previously recognized, current support mechanisms do not cover these costs, which often make it impossible for rural providers to offer economically-priced high-speed access in

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[38] Many carriers have entered into agreement to buy network equipment based on the FCC's current rules. Study area-specific freezes may make it impossible for carriers to recover the costs of deploying these facilities. Nothing in this *Further Notice* proposes a method to grandfather such existing commitments.

[39] The *Further Notice* proposes an "automatic satellite exception" where rural RoR ILECs may satisfy broadband build-out commitments by use of satellite technology for very high cost loops (i.e., loops where the additional cost to provide broadband is in excess of 150 percent of the carrier's study area average loop cost. *Id.*, *Appendix C*, ¶ 27.) The proposed automatic exception cannot apply to more than two percent of a carrier's total loops within a study area, however. *Id.* A more reasonable limit on the number of very high cost loops for which a rural ILEC can use satellite service may be closer to 5 percent, however.

[40] The Act generally defines universal service as an evolving level of "telecommunications services." *See* 47 U.S.C. § 254(c)(1). Since section 254(3) of the Act permits eligible carriers to use universal service support only for the provision, maintenance and upgrading of facilities and services "for which the support is intended, 47 U.S.C. § 254(e), it is unclear whether a Commission rule mandating use of universal service funds for broadband Internet access, a non-telecommunications service, will be consistent with section 254's directives.

rural areas.[41] Commission efforts to consider ways to modernize existing Universal Service programs for evolving broadband-based services will be far more effective in assuring universal broadband deployment than harsh "take it or leave it" funding commitments.

As NECA has previously suggested, the Commission should first address near-term intercarrier compensation and USF reform as recommended herein and then initiate a separate proceeding to address the interconnection and cost recovery issues associated with rural broadband services.[42]

Finally, the Commission should not attempt to implement reverse auctions as a way of dealing with carriers who cannot make, or live up to, a five-year universal broadband deployment commitment. NECA and numerous other commenters in this proceeding have repeatedly explained reverse auctions are unworkable as a practical matter and are likely to embroil the Commission, carriers and state regulators in unending legal and administrative disputes.[43] The record also shows reverse auctions would eliminate the long-term financial stability required by financial institutions to fund network build-out in rural areas; would severely limit carrier incentives to invest in network upgrades, new technologies and the provision of advanced services; and would

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[41] *High-Cost Universal Service Support*, WC Docket No. 05-337, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Recommended Decision, 22 FCC Rcd 20477 (2007), at 21.

[42] *See, e.g.,* Letter from Joe A. Douglas, NECA to Marlene H. Dortch, FCC, CC Docket Nos. 01-92, and 96-45 and WC Docket Nos. 06-122 and 08-52 (Sept. 11, 2008).

[43] *E.g.,* NECA Comments, WC Docket No. 05-337 (May 31, 2007), at 3; NTCA Comments, at 30; GCI Comments, RICA Comments, at 85; GVNW Comments, at 21; WTA Comments, at 29 (all filed in WC Docket No. 05-337 on Apr. 17, 2008).

place service quality in jeopardy, including services that support public safety, homeland security, and disaster recovery.[44]

The current proposal does little if anything to alleviate these concerns. Carriers will still require assistance from financial institutions to build advanced networks and offer advanced services. Especially in this current capital starved, risk-averse market, it is highly unlikely banks will place their bets on rural network providers who can provide no guarantee they will be the provider over the next 5 years, let alone the term of a loan commitment. Under a reverse auction structure, basic services such as public safety, homeland security, and disaster recovery requiring high quality and high reliability will likely suffer. The ultimate losers will be rural consumers who will see service quality degrade, instability in pricing as providers frequently change – and perhaps no broadband service at all as administrative nightmares and court challenges keep their service in never-ending limbo.

There are a variety of ways for the Commission to assess carriers' progress towards universal broadband deployment short of imposing unworkable and "hyper-regulatory" reverse auctions. The Commission could, for example, expand broadband monitoring reports to cover progress towards broadband commitment goals. Such reports could identify specific problem areas (*i.e.*, locations that will not have a basic level of broadband service within the allotted time) and permit the Commission and state regulators to develop more reasonable, targeted means of achieving broadband goals for particular areas. Such cooperative mechanisms are far more likely to produce desired

[44] *E.g.*, TCA Comments, at 15-16; Time Warner Telecom, at 15; Sprint Nextel at 12; Rural Cellular Assoc., at 66, 68 (all filed in WC Docket No. 05-337 on Apr. 17, 2008).

results and avoid unending administrative, legal and regulatory problems associated with reverse auction mechanisms.

F. The Commission Should Replace the Existing Identical Support Rule with a Cost-Based Mechanism Targeting Specific Deployment Goals.

The *Further Notice* proposes two approaches for replacing the current identical support rule. Under the approach described in Appendix A, CETCs would receive support based on a showing of individual costs, with support targeted to high cost areas defined by reference to existing ILEC support mechanisms.[45] Under Appendix C, support for CETCs would simply be phased out over a five-year period, and a new proceeding initiated to develop targeted support for advanced mobile wireless services in underserved rural areas.[46]

NECA supports replacement of the current identical support rule with a cost-based mechanism. Costs incurred by ILECs and CETCs in providing universal service in rural areas are not identical.[47] Different network technologies carry different costs, both to build and to maintain the network. Further, as "dominant" carriers under the Commission's rules, rural ILECs face the full panoply of regulatory obligations imposed under Title II of the Telecommunications Act and must also serve as the "Carrier of Last Resort" in their service territories. The Act contemplates the possibility that competitive

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[45] *Further Notice,* Appendix A, ¶¶ 51-56.

[46] *Further Notice,* Appendix C, ¶ 52.

[47] "[I]t is as clear as clear can be that the costs of investing and maintaining wireless and wireline infrastructure are inherently different. I believe that wireless can and should be a part of Universal Service, but the time has come to put an end to the irrational and costly system of supporting wireless carriers based on the cost of wireline incumbents." Statement of Commissioner Michael J. Copps before the Senate Commerce Committee (Mar. 1, 2007).

providers might displace incumbents.[48] Absent such marketplace shifts, however, regulatory differences between ILECs and CETCs warrant they be treated differently.

The cost-based approach to CETC support described in Appendix A of the *Further Notice* appears workable from a mathematical perspective, but may be challenged as arbitrary insofar as it defines high cost for CETCs in terms of costs incurred by wireline ILECs.[49] A better approach would be to replace existing identical support payments to CETCs with cost-based support targeted to achieve specific public interest goals. It appears the Commission intends to pursue one such goal (*i.e.*, deployment of advanced wireless broadband services in rural areas) as part of the further rulemaking proceedings described in Appendix C of the *Further Notice*.[50]

III. THE COMMISSION SHOULD AVOID ACTIONS THAT WILL LEAD TO REGULATORY CHAOS RATHER THAN REFORM.

The reforms described in the previous pages are consistent with the "growing consensus" approach described by Commissioners Copps, Adelstein, Tate and McDowell in their *Joint Statement* and should be adopted without delay.

Other portions of the Commission's *Further Notice* include proposals that should not be adopted at all, or that require substantial further study and amendment. In the following sections NECA explains that the Commission should not adopt study-area specific caps or freezes on Universal Service support to RoR ILECs (or employ reverse

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[48] 47 U.S.C. § 251(h)(2). *See e.g., Petition of Mid-Rivers Telephone Cooperative, Inc. for Order Declaring it to be an Incumbent Local Exchange Carrier in Terry, Montana Pursuant to Section 251(h)(2),* Report & Order, 21 FCC Rcd 11506 (2006) (*Mid-Rivers Order*).

[49] *See* Letter from Paul W. Garnett, CTIA to Marlene H. Dortch, FCC, CC Docket No. 01-92 and WC Docket Nos. 05-337, 06-122, and 04-36 (Oct. 2, 2008), presentation at 8.

[50] *Further Notice,* Appendix C, ¶ 339.

auctions to determine Universal Service support) because such mechanisms are fundamentally inconsistent with existing RoR regulatory methods, and would make it impossible for carriers or the Commission to fulfill the nation's broadband deployment goals. Nor should the Commission improperly classify any IP/PSTN services as information services without considering the nature of specific services offered; impose a new, untested "additional costs" standard that produces unreasonably low rates for rural RoR carriers, or adopt unduly harsh rules requiring carriers to charge uniform state-wide or symmetrical rates that fail to reflect individual carrier network costs.

A. Proposed Study Area-Specific Caps or Freezes on Universal Service Support, in Combination with Below-Cost Interconnection Rates, Will Amount to Rate Confiscation and Unfairly Terminate Rate of Return Regulatory Status for Small Carriers.

The *Further Notice* includes language supporting the importance of maintaining and expanding universal service in rural areas.[51] The proposals set forth in the *Further Notice* appear intended, however, to accomplish exactly the opposite result. In particular, proposed individual caps or freezes on study area support levels will make it impossible for RoR carriers to continue providing service as "carriers of last resort." These proposals will also systematically and unlawfully prevent RoR carriers from achieving the authorized rate of return, and effectively terminate, without notice, rate-of-return regulatory status for the approximately 1200 small local exchange carriers currently regulated on this basis. This dramatic change in regulatory status is not even discussed in the *Further Notice*, let alone justified.[52]

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[51] *E.g., Further Notice,* Appendix A, ¶¶ 4, 12.

[52] Possibly the Commission intends this result. If so, it is obligated to make this intention clear, and explain why it is considering undoing a regulatory regime that has served both carriers and customers well for nearly 100 years.

NECA member companies are also concerned that the proposals set forth in the *Further Notice* will amount to an unconstitutional "taking" of their property without just compensation. These companies are expected to provide not only basic services, but advanced broadband services as well, in remote rural areas, where market returns cannot possibly justify the investment in plant and maintenance expenses needed to provide such services. Yet, in the *Further Notice*, the Commission proposes to cut intercarrier compensation rates and limit Universal Service support, while threatening carriers with reverse auctions if they fail to provide universal broadband Internet access in five years.

The *Further Notice* dismisses concerns of rate confiscation as unfounded, noting the proposed plan would permit carriers to increase SLC rates and also provides the ability to seek supplemental Universal Service support in certain circumstances.[53] Taken as a whole, however, the proposed combination of below-cost intercarrier rates and Universal Service study area freezes appear designed to *systematically* prevent RoR carriers from earning at authorized levels. As such, the proposed plan is by definition arbitrary and capricious, if not unconstitutional.

The Supreme Court set forth the constitutional framework for utility rate-of-return regulation in the *Bluefield Water* and *Hope Natural Gas* cases.[54] Under the *Bluefield-Hope* standard, a utility or carrier has the constitutional right to charge rates to its customers that permit the company the opportunity to earn profits equal to those earned by companies with comparable risks, but not the right to charge more. The authorized

[53] *Further Notice*, Appendix A, ¶ 268.

[54] *Bluefield Water Works & Improv. Co. v. West Virginia Pub. Serv. Comm'n*, 262 U.S. 679 (1923); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

rate-of-return must also allow the carrier to maintain financial integrity, such that it can borrow money on reasonable terms and attract additional capital investment.[55]

The FCC has long recognized this constitutional limitation on its regulatory power, stating, for example, that a carrier under RoR regulation must be permitted to recover its interstate costs and investments, determined under the Separations process, through interstate rates because any failure to do so "would be clearly unlawful as [being] confiscatory."[56] The Commission has also recognized the 1996 Act retained protections against confiscatory rates, even in the new world of local competition and interconnection based on forward-looking costs for local interconnection.[57]

Far from being permissible under the *Bluefield-Hope* standard, however, the combination of below-cost intercarrier rates and USF freezes proposed in the *Further Notice* is likely to be overturned because they do not permit RoR carriers a reasonable opportunity to earn at authorized levels. Even with the modifications proposed in Appendix C, carriers would have no reasonable opportunity to recover their interstate revenue requirements because support for interstate common line costs currently provided under the Commission's ICLS mechanism would be frozen on a study area basis after 2010. Thus, to the extent a company's common line revenue requirement

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[55] *Bluefield Water*, 292 U.S. at 690.

[56] *American Tel. & Tel. Co.: Manual and Procedures for the Allocation of Costs*, Report & Order, 84 FCC 2d 384, at ¶ 22 (1981) (*AT&T Cost Allocation Manual Order*), *citing Bluefield Water* and *Hope Natural Gas*. *See also Smith v. Illinois Bell Tel. Co*., 270 U.S. 587 (1926).

[57] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996;* and *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Report & Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 15499 (1996), at ¶700, n.1707. ("The concept of normal profit is embodied in forward-looking costs because the forward-looking cost of capital, *i.e*., the cost of obtaining debt and equity financing, is one of the forward-looking costs of providing the network elements. This forward-looking cost of capital is equal to a normal profit.")

increases in 2011 and thereafter, it would be denied recovery of these amounts.[58] To the extent a company's SLC revenues decline due to line losses, there may be limited offsetting support in the "ICLS2" mechanism proposed in Appendix C, but this only operates for five years (2009 through 2013), is capped, and must also cover interstate and intrastate switched access revenue losses from demand decreases.[59]

A plan that systematically prevents carriers from achieving the authorized rate of return resembles the "automatic refund rule" vacated in 1988 by the D.C. Circuit in *AT&T v. FCC.*[60] There, the Commission adopted rules requiring carriers to refund any amounts collected in excess of the authorized rate-of-return, plus a specified buffer.[61] The rules operated on a service category basis (*i.e.*, a carrier with switched access earnings above the cap would have been required to make a refund of excess profits even when its overall interstate earnings were below the authorized rate-of-return.) Because the refund formula had the effect of ensuring carriers would suffer an economic loss over the long term, it was accordingly vacated as arbitrary and capricious.[62] The same result

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[58] In a letter to Commission staff filed October 27, 2008, NECA explained that freezing study area support would result in revenue recovery shortfalls for 800 out of 1200 RoR carriers. *See* Letter from Regina McNeil, NECA, to Dana R. Shaffer Chief, WCB, CC Docket No. 96-45 (Oct. 27, 2008).

[59] It is questionable there will be adequate ICLS2 funds for the needs under the cap, and there is no defined method to determine how ICLS2 funding limited by the cap would be distributed between companies and between line loss and MOU loss impact, as well as between the interstate and intrastate jurisdictions.

[60] *See* AT&T v. FCC, 836 F.2d 1386 (D.C. Cir. 1988).

[61] *Authorized Rates of Return for the Interstate Service of AT&T Communications and Exchange Telephone Carriers*, Report & Order, 58 Rad. Reg. 2d (P&F) 1647 (1985) (*RoR Order*).

[62] A key factor in the court's decision striking the automatic refund rules was the FCC's prescription of the authorized rate-of-return as a single point at the intersection of the "minimum level" necessary in order to avoid confiscation and at the "maximum allowable" to avoid harm to consumers. Because of the FCC's "precision" in prescribing the authorized rate-of-return, the court demanded that FCC's rules also provide carriers with a reasonable opportunity to hit the balance point. The automatic refund rules, as constructed by the FCC, had the effect of ensuring carriers would most likely miss the balance point, even with buffers, and then only on the low side.

appears likely here if the FCC implements proposed rate reductions while simultaneously capping and freezing high cost support levels for RoR carriers.

Study area-specific caps or freezes on ILEC support mechanisms appear to be unnecessary in any event. Recent historic growth in high-cost funding mechanisms has been driven by increases in support payments to CETCs, particularly to wireless carriers, and not by increases in ILEC support.[63] As shown by the chart appended to these comments, overall support to rural ILECs has been stable since 2003. No factual basis therefore exists for imposing study area-specific freezes on existing ILEC high-cost funding mechanisms.[64]

B. New Rate Mechanisms Should Target Unified – Not Uniform – Rates Reflecting Actual Network Cost Differences Among Carriers.

Virtually all commenters in this proceeding have suggested it would be desirable for carriers to charge *unified* rates for terminating interconnected interexchange traffic. That is, an individual carrier should be able to charge the same rate for transporting and

[63] This has led the Commission to impose individual caps on wireless carriers in the context of reviewing merger agreements, *e.g.*, *Applications of ALLTEL Corporation, Transferor, and Atlantis Holdings LLC, Transferee For Consent To Transfer Control of Licenses, Leases and Authorizations*, WT Docket No. 07-128, Memorandum Opinion and Order, 22 FCC Rcd 19517 (2007), at ¶ 9, *Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC, for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements*, WT Docket No. 08-95, File Nos. 0003463892, *et al*., ITC-T/C-20080613-00270, *et al*. and *Petition for Declaratory Ruling that the Transaction is Consistent with Section 310(b)(4) of the Communications Act*, File No. ISP-PDR-20080613-00012, Memorandum Opinion and Order, FCC 08-258 (rel. Nov. 10, 2008) ¶ 3, *Sprint Nextel Corporation and Clearwire Corporation Applications for Consent to Transfer Control of Licenses, Leases, and Authorizations*, WT Docket No. 08-94 and File Nos. 0003462540 *et al*., Memorandum Opinion and Order, FCC 08-259 (rel. Nov. 7, 2008), at ¶ 3; and to impose a much-needed cap on overall CETC funding. *High-Cost USF* Support, WC Docket No. 05-337, *Federal-State Joint Board on Universal* Service, CC Docket No. 96-45, *Alltel Communications, Inc., et al. Petitions for Designation as Eligible Telecommunications Carriers RCC Minnesota, Inc. and RCC Atlantic, Inc. New Hampshire ETC Designation Amendment*, Order, 23 FCC Rcd 8834 (2008) (*Interim Cap Order*).

[64] To the extent an overall cap is maintained on rural high cost funding at all, it should adjusted to reflect an inflation factor rather than using the current rural growth factor approach, which has the effect of penalizing carriers when "plain old telephone service" (POTS) lines are replaced by high-speed broadband services.

terminating traffic regardless of whether the underlying call is interstate or intrastate in nature. Because both types of calls use essentially the same facilities, there are no cost differences involved in transporting or terminating them.[65]

The proposals set forth in Appendices A & C of the *Further Notice* go beyond this consensus position, however, and insist that interconnection rates be uniform on a state-wide basis, as well as symmetrical between interconnecting carriers.[66] Uniform or symmetrical rates make no sense, however, when networks have different cost structures. Indeed, it is somewhat bewildering why the Commission would propose in one portion of the *Further Notice* to base Universal Service support for CETCs on individual costs, while at the same time proposing a methodology for intercarrier compensation that deliberately seeks to avoid individual costs in establishing rates.[67]

One possible concern with individual cost-based rates is the possibility that some carriers, notably those serving sparsely-populated rural areas, may establish transport and termination rates that are substantially higher than those charged by larger carriers serving urban areas.[68] In a competitive environment, high traffic sensitive rates indeed

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[65] With respect to local calls, unified rates may make sense when transaction costs exceed network cost differences. It may be the case, for example, that toll calls require more switching and transport than local calls, but the cost of maintaining separate billing systems may exceed the benefits of having separate reciprocal compensation rates for the two categories of voice calls.

[66] *Further Notice,* Appendix A, ¶ 194; Appendix C, ¶ 189.

[67] It is equally bewildering why the FCC would exempt Alaska, Hawaii, and all U.S. Territories and possessions from the Universal Service and intercarrier compensation reform proposals described in the *Further Notice.* According to the Commission, these areas "have very different attributes and related cost issues than the continental states." *Further Notice,* Appendix A, ¶ 13. Yet the same cost differences also apply to rural areas within the continental U.S., many of which are at least as rural and as costly to serve as areas within Hawaii, Alaska and the various Territories and possessions.

[68] Based on a theoretical economic model published by the Phoenix Center, the *Further Notice* asserts that relatively high access rates discourage broadband deployment. *Further Notice,* Appendix A, ¶ 189. Yet, NECA data shows rural carriers, who generally have higher access rates, also have the highest levels of broadband penetration. *See supra,* n. 35.

may speed up the decline in legacy circuit switched voice service and perhaps create upward pressure on retail rates for long distance services.

On the other hand, near-zero rates would make the legacy circuit-switched network too economically enticing for retail service providers, who use rural networks to deliver their services, to leave. Sound pricing methods reflecting the actual costs of individual networks would address Commission concerns about rate arbitrage and send rational pricing signals to the communications industry. For these reasons, NECA supports unifying interstate and intrastate originating and terminating access charges, while providing alternative sources of revenue recovery for affected ILECs. As indicated above, this action would be consistent with the *Joint Statement* issued by Commissioner's Copps, Adelstein, Tate and McDowell, and would represent a significant milestone in ICC reform.

The Commission's proposal to adopt a new "additional costs" standard that would eventually reduce all intercarrier charges to uniform levels below existing TELRIC rates raises serious concerns, and should not be adopted. These concerns would remain even if the Commission were to establish a replacement mechanism that guarantees RoR carriers the ability to earn at authorized levels despite imposition of near-zero intercarrier rates.

NECA has previously pointed out, for example, such low rates are insufficient to cover rural RoR carriers' costs of billing, let alone network expenses.[69] A rate structure that sets rates below network billing costs would be extremely inefficient, will likely cause ILECs not to bill for services at all, and give rise to uneconomic and irrational business models.

[69] Letter from Richard A. Askoff, NECA, to Marlene H. Dortch, FCC, CC Docket No. 01-92, (Oct. 6, 2008), at 3.

Such low rates would also encourage new forms of uneconomic arbitrage, abuse of the network, and retard movement to broadband-based networks and services. For example, rules establishing a default rate of $0.0007 or below for interconnecting carriers would undoubtedly prompt large end users to seek "carrier" status to take advantage of below-cost interconnection pricing. It is hard to understand why the Commission would replace an existing ICC framework that encourages one kind of rate arbitrage with a system that merely creates new forms of rate arbitrage. Near-zero prices for switched access would also likely generate substantial network reconfiguration costs as carriers replace dedicated transport services with "free" switched services. And establishing a near-zero price for switched access would discourage business models based on broadband IP networks, which will as a matter of course be priced higher than zero. This is clearly not the intent of the Commission's reform effort, but would likely be an outcome of that effort.

The Commission's proposed additional cost standard also ignores cross-elastic demand effects, which are important as customer demands move towards bundled services. Faulhaber, for example, makes clear that cross-elastic demands must be considered when defining a core set of acceptable pricing arrangements.[70] The Commission's proposal, which focuses only on per-minute interconnection rates, does not seem to incorporate these principles.

The proposed standard also fails to recognize risks associated with irreversible (stranded) investments. An owner of network that bears the risk of investing in network

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[70] Gerald R. Faulhaber, *Cross-Subsidization: Pricing in Public Enterprises*, 65 AM. ECON. REV. 966, at 975- 976.

is normally entitled to a risk premium.[71] Interconnection arrangements under section 251 and 252 of the Act generally require ILECs to bear all investment risks as the incumbent carrier of last resort (*i.e.*, interconnecting carriers can choose to withdraw from interconnection arrangements, leaving the ILEC with stranded investment). While the ILEC should receive a rate premium associated with the risks of such stranded investment, the proposed additional cost standard, if adopted, would ignore this element.

Finally, by assigning essentially all network cost recovery to end users and Universal Service contributors, the Commission's pricing plan appears to ignore critical equity issues. End users and the Universal Service Fund should not bear the whole brunt of network cost recovery.[72] The FCC's rules have long recognized that interconnecting carriers gain specific benefits from the network and should be required to pay their fair share of network costs. The proposed additional costs standard abandons this approach.

It appears existing TELRIC standards for pricing interconnection under section 251(b)(5), while flawed, represent a better alternative than the proposed new additional costs standard. TELRIC is based on the forward-looking cost of facilities actually used by interconnecting carriers. Therefore, it is based on specific network configurations, which makes TELRIC more cost causative compared to the proposed additional cost standard. TELRIC also includes a common cost additive to recover total forward looking common costs; the additional cost standard excludes common costs. While TELRIC does not recover all network costs, it can at least be adapted to work in accordance with the

[71] *See, e.g.,* Avinash K. Dixit and Robert S. Pindyck, Investment Under Uncertainty , Princeton University Press (1994), at 39-41.

[72] The Rural Alliance and others have pointed out in this proceeding that transferring disproportionate share of network costs caused by interconnecting carriers to alternative recovery mechanisms runs the risk of unduly burdening the Universal Service Fund. *See supra* n. 5, *Rural Alliance* presentation, at 5.

pricing concepts described above and therefore may represent a more reasonable approach to pricing interconnection in the future.

In sum, the Commission should not adopt rules requiring carriers serving rural areas with high network costs to adopt rates based on other carriers' lower costs. Nor should the Commission impose a new pricing standard based on an untested "additional costs" model. Instead, the Commission's proposed ICC reform plan should lay the groundwork for network interconnection in the all-IP, broadband network environment now being deployed.

Small rural carriers are acutely aware of the need for the Commission to address broadband network interconnection and cost recovery issues as their ability to recover network costs will be severely challenged. Today's pricing structures for interconnection of broadband packet networks require small rural carriers to pay large carriers to interconnect to IP backbones. Such costs must then be recovered from rural customers. Network pricing structures for interconnection must evolve in such a way as to allow small rural carriers to provide broadband services to rural customers at reasonable, comparable prices as required under section 254 of the Act, without extreme reliance on the USF. These are precisely the issues the Commission should consider in further proceedings on ICC and USF reform.[73]

C. The Commission Must Consider Actual Service Characteristics to Determine Whether IP/PSTN Services Are "Information Services."

The *Further Notice* proposes to classify as "information services" those services originating calls on IP networks and terminating them on circuit-switched networks, or conversely originating calls on circuit-switched networks and terminating them on IP

[73] *See supra*, p. 6.

networks (collectively, "IP/PSTN" services). According to the *Further Notice,* these calls undergo a "net protocol conversion between end users" and are therefore enhanced or information services.[74]

Although the *Further Notice* recognizes an exception to this treatment applies to services offering "protocol conversion in connection with the introduction of new technology to implement existing services,"[75] it finds IP/PSTN services, including VoIP services, are not mere changes to the underlying technology used for "existing" services but are instead entirely new services "with characteristics in many ways distinct" from pre-existing telephone services.[76]

Such a determination, if made, will almost certainly be reversed by a reviewing court as arbitrary and capricious. First, the Commission's basic premise is wrong as a technical matter, at least with respect to interconnected VoIP telephony services. Interconnected VoIP services, such as those provided by cable TV or "over the top" VoIP providers, are primarily (if not solely) configured to permit end users to place ordinary voice calls from one telephone instrument to another, and generally employ the same consumer premises equipment (CPE) as traditional circuit-switched services. No change in format or content occurs on an end-to-end basis, and contrary to claims, no "net protocol conversion" is involved. Such services therefore cannot be considered "information services" as a matter of law.[77]

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[74] *Further Notice,* Appendix A, ¶ 209.

[75] *Id.* at ¶ 210.

[76] *Id.*

[77] *See Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges,* WC Docket No. 02-361, Memorandum Opinion & Order, 19 FCC Rcd 7457 (2004), (*AT&T "IP-in-the-Middle" Order*) at ¶ 12 (Finding that users of AT&T's end-to-end voice service obtain only voice transmission with no net protocol conversion, rather than information services such as access to

Second, even if such calls could be said to undergo a net protocol conversion, the "existing services" exemption would apply because such services do not have characteristics that are distinct, in any meaningful way, from ordinary voice telephony services using circuit switched technology.

The *Further Notice* asserts in this regard that IP/PSTN services are "entirely new services with characteristics in many ways distinct from pre-existing telephone services." But no explanation is provided as to exactly how IP-enabled services such as interconnected VoIP are "distinct" from pre-existing telephone services. The *Further Notice* merely points out that prior decisions imposing traditional telephone service requirements on interconnected VoIP merely found such services to be "substitutes" for existing basic voice services, not necessarily "the same as" basic services.[78]

This approach ignores both reality and prior explicit Commission findings to the contrary. The Commission has not simply found VoIP services to be substitutes for traditional telephony services – it has found such services to be *indistinguishable* from such services from an end user perspective.[79] This is a critical difference. Obviously, a

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stored files.) Similarly, as NARUC has recently explained, the "VoIP" voice services currently offered by companies like Vonage or facilities-based carriers "do not provide subscribers with additional, different, or restructured information. Nor does the real-time voice service they provide involve subscriber interaction with stored information, which is a characteristic of an "enhanced" or information service. The information transmitted – i.e., the voice communication – is of the subscriber's own design and choosing. The IP technology used to transmit the voice transmission is completely transparent to the calling and called parties and functionally equivalent to existing phone service." NARUC Comments, WC Docket No. 04-36 (filed May 28, 2004), at 8.

[78] *Further Notice,* Appendix A, n. 534. According to the Commission, "whether a service is viewed by consumers as a possible substitute for a "basic" service is a distinct question from whether, as a matter of technology and the nature of the service offering, the service simply replaces the technology underlying a pre-existing basic service."

[79] *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information,* CC Docket No. 96-115, *IP-Enabled Services,* WC Docket No. 04-36, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6927 (2007), at ¶56 *(2007 CPNI Order); See also Assessment and Collection of Regulatory Fees for*

service can be considered a "substitute" for another without necessarily being identical or "like" that service. Instant messaging and e-mail services, for example, are used by many consumers as substitutes for telephone voice calling, but this does not mean such services should be classified the same for regulatory purposes.

But when a technology, such as VoIP, is used to offer a service that is indistinguishable from traditional telephone services by end users, more than mere "substitution" has occurred. The customer has not given up voice calling, as in the e-mail example, but merely chosen to use what appears to be a lower-priced version of the same basic service. It is for this precise reason VoIP service providers heavily market their services as direct replacements for traditional telephony services. Apart from the availability or non-availability of a few "bells and whistles," [80] consumers simply cannot tell the difference between the two services. Since the *Further Notice* fails even to mention what service characteristics supposedly make IP/PSTN services "distinct" from traditional telephony, it appears the Commission cannot rationally distinguish between them either.

Rather than examine the actual characteristics of the services being classified, the *Further Notice* apparently attempts to determine the regulatory treatment of VoIP solely on the basis of network transmission technology used to offer the service. This approach is directly contrary to the Commission's long-standing policy of applying a technology-neutral approach to service classification. Technology traditionally outpaces regulation,

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Fiscal Year 2007, MD Docket No. 07-81, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15712 (2007), at ¶18 *(2007 Regulatory Fees Order).*

[80] The FCC has already determined such add-on features do not make a basic service enhanced. For example, it ruled ILECs could not escape Title II regulation by simply packaging telephone service with voice mail. *See IDCMA Petition for a Declaratory Ruling that AT&T's Interspan Frame Relay Service is a Basic Service,* Memorandum Opinion and Order, 10 FCC Rcd 13717 (1995), at ¶¶ 40-46.

and even the most dedicated agency could not keep up with the shell game that would result if regulatory classification decisions were made based on the technology used rather than the service offered. The Commission has therefore sensibly based its prior regulatory decisions on the nature of the service offering, as viewed by end users, not on the technology employed to offer a service.

This approach has been employed by the Commission on a consistent basis for years. In its investigation of AT&T's Digital Dataphone Service ("DDS"), for example, the Commission rejected claims that a digital service should be classified differently than comparable analog services because it used a different transmission technology and had different technical characteristics.[81] The Commission correctly concluded such technology differences were immaterial because evidence showed customers perceived the two services to be similar:

> While DDS uses a different transmission technology from analog services, this is insufficient justification to find that the services are unlike. Traditionally, communications carriers have not differentiated between services which offer the customer a similar function using different technologies (in this case, carrying data between two points at discrete speeds). For example, international services using satellites and cables; domestic message telecommunications service calls by satellite or terrestrial; domestic communications using coaxial cable, microwave radio, or other facilities are not offered as 'unlike' services at different rates. Similarly, while DDS and analog data services use different transmission technologies, they perform a similar communications function, are perceived by the customer as similar services and their demand appears to be highly cross-elastic.[82]

[81] *American Telephone and Telegraph Company Investigation into the lawfulness of Tariff F.C.C. No. 267, offering a Dataphone Digital Service Between Five Cities*, Docket No. 20288, Final Decision and Order, 62 FCC 2d 774 (1977).

[82] *Id.* at ¶ 75b. Courts have uniformly affirmed the Commission's emphasis on customer perception in considering functional equivalency. *See, e.g., American Broadcasting Cos., Inc. v. FCC*, 663 F.2d 133 (D.C. Cir. 1980). *Accord, Ad Hoc Telecommunications Users Council v. FCC*, 680 F.2d 790 (D.C. Cir. 1982).

Similarly, when investigating AT&T's rates for its long distance services, the Commission concluded that MTS and WATS were "like services" because they were "functionally equivalent" based on customer perception of these services. [83] The fact the two services used slightly different equipment, network procedures and billing practices was immaterial, according to the Commission. [84]

In its 1998 Report to Congress, which tentatively addressed the classification of interconnected VoIP services, the Commission clearly stated that "the classification of service under the 1996 Act depends on the functional nature of the end-user offering."[85] More specifically:

> "A telecommunications service is a telecommunications service regardless of whether it is provided using wireline, wireless, cable, satellite, or some other infrastructure. Its classification depends rather on the nature of the service being offered to customers. Stated another way, if the user can receive nothing more than pure transmission, the service is a telecommunications service. If the user can receive enhanced functionality, such as manipulation of information and interaction with stored data, the service is an information service. A functional analysis would be required even were we to adopt an overlapping definition of "telecommunications service" and "information service."[86]

Under this standard a service primarily offering users the ability to make point-to-point local and long distance voice calls, in a manner functionally indistinguishable from other types of voice calling services from the end users' perspective, cannot rationally be

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[83] *American Tel. & Tel. Co. (WATS),* Final Decision & Order, 70 FCC 2d 593 (1978).

[84] *See also* AT&T Communications Revision to Tariff FCC No. 12, 6 FCC Rcd. 7039 at ¶¶ 21-23; *MCI Telecommunications Corp. v. FCC*, 917 F.2d 30 (DC Cir. 1990)("likeness" within the meaning of Section 202(a) turns upon "functional equivalence"); *CompTel v. FCC*, 988 F2d 1058, (D.C. Cir. 1993), *citing Ad Hoc Telecommunications Users Comm. V. FCC*, 680 F.2d 790, 795 (D.C. Cir. 1982) (likeness inquiry "focuses on whether the services in question are different in any material functional aspect.") In applying this test, the FCC must "look to the nature of the services offered" and ascertain whether customers view them as performing the same functions." MCI, *supra*, 917 F.2d at 39.

[85] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11543 (*1998 Report to Congress*).

[86] *Id.* at ¶ 59.

subject to different regulatory classification.[87] Yet, the *Further Notice* proposes to make exactly this determination, without providing any factual basis or even attempting to analyze the functions provided by specific services or the way such services are perceived and utilized by customers in the marketplace. This unexplained and unjustified departure from established Commission precedent will almost certainly lead a reviewing court to reject the Commission's proposed classification decision as arbitrary and capricious.[88]

In any event, the classification decision described in the *Further Notice* should not be adopted because it utterly fails to consider the dramatic and adverse consequences such a determination would have on rural RoR carriers and their customers. Carriers are already embroiled in disputes with smaller providers who refuse to pay access for interexchange calls on the basis such calls are "IP originated" and hence exempt from access charges. [89] Larger carriers are starting to make the same claims with respect to

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[87] Providers of interconnected VoIP service frequently assert classification of their voice calling services as basic will somehow "stifle innovation." *See e.g.*, Letter from Brita D. Strandberg, The VON Coalition to Marlene H. Dortch, FCC, CC Docket No. 01-92 and WC Docket No. 04-36 and 05-25 (Oct. 2, 2008). The Commission's classification of such services as "basic" will, however, only create a level playing field among competitors, not stifle innovation.

[88] It is entirely possible some IP/PSTN voice services might be viewed by end users (and therefore, reasonably by a regulatory agency) as "unlike" basic telephony services. One example might be a service that permits end users to play video or other games over the PSTN, and incidentally allows for voice communications between users during the course of such games. No consumer would confuse such a service with ordinary voice telephony service, however, and a decision to classify such a service as an "information service" might well be rational, particularly as such a service would likely involve interaction with stored data or other forms of information such as game protocols.

[89] *Frontier Telephone of Rochester, Inc. v. USA DataNet Corp*., 386 F.Supp.2d 144 (W.D.N.Y., 2005); *Complaint of TVC Albany, Inc. d/b/a Tech Valley Communications Against Global NAPS, Inc. for Failure to Pay Intrastate Access Charges*, Case No. 07-C-0059, Order Directing Negotiation (NY PSC, Mar. 30, 2008), *The Southern New England Telephone Company v. Global NAPS, Inc. et al*., 251 F.R.D. 82, (D.Conn., 2008); *Global NAPS v. Bellsouth*, 455 F.Supp.2d 447 (E.D.N.C.,2006); *Complaint and Request for Emergency Relief of Global NAPS Georgia, Inc. against Bellsouth Telecommunications, Inc. d/b/a AT&T Georgia*, Docket No. 12921, *Final Order*, GA PSC (Nov. 15, 2007); *Request for Expedited Declaratory Ruling as to the Applicability of the Intrastate Access Tariffs of Blue Ridge Telephone Company, Citizens Telephone Company, Plant Telephone Company, and Waverly Hall Telephone LLC to the Traffic Delivered to Them by Global NAPS, Inc. and Blue Ridge vs GNAPs*, Docket No. 21905, Initial

their interexchange traffic as well.[90] The proposed classification decision could, if adopted, therefore dramatically increase such claims and drastically decrease access revenues in a short time frame, as virtually all carriers would attempt to claim "information services" status for their traffic. This will create an avalanche of billing disputes and lost access revenue as competitive market pressures force other carriers to follow suit, swamping small rural carriers who lack the resources to dispute such claims.[91]

Not only will small ILECs see their access revenue dry up overnight, they would not be able to replace these revenues automatically with reciprocal compensation revenue even if such compensation were determined to apply. The requisite interconnection agreements are not in place to allow billing for such traffic, and where agreements do exist they will need to be renegotiated.[92] This will cause immediate shortfalls in cost

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Order, GA PSC (Apr. 8, 2008); *Cox California Telecom v. Global NAPS California*, Case No. 06-04-026, Order Granting Complainant's Motion for Summary Judgment (CA PUC, Apr. 28, 2006); *Pacific Bell Telephone Company, d/b/a/ AT&T California v. Global NAPS California, Inc*., Case No. 07-11-018, Modified Presiding Officer's Decision Finding Global NAPS California in Breach of Interconnection Agreement (CA PUC, Nov. 19, 2007); *3 Rivers Telephone Cooperative et al. v. CommPartners,* Docket No. 08-68, Complaint (D. Montana 2008); *Hollis Telephone Company, Inc, et al. Joint Petition for Authority to Block Traffic from Global NAPS, Inc.*, Case No. DT-08-028, Procedural Order and Order on Motion to Compel Discovery Response (NH PSC, Sept. 17, 2008).

[90] *See e.g.,* Complaint of Embarq Florida, Inc. Against MCI Communications Services, Inc. d/b/a Verizon Business Services for Failure to Pay Intrastate Access Charges Pursuant to Embarq's Tariffs, Docket No. 080308 (FL PSC, June 6, 2008).

[91] Free Press, among others, recognizes the seriousness of this problem. In its Oct. 24, 2008 *ex parte* letter, attached to the *Further Notice* in Appendix D, it "strongly urges" the Commission to leave this monumental decision to a *Further Notice*, as this change "will completely upend the structure of Section 251 and create massive uncertainty as to the future of the entire industrial interconnection regime." In Free Press' view, this move "would jeopardize the future of the advanced telecommunications market, something that is in direct conflict with Section 706 of the 1996 Act." *See* Letter from Ben Scott and S. Derek Turner, Free Press, to Marlene H. Dortch, FCC, WC Docket Nos. 05-337 and 06-122; CC Docket Nos. 96-45 and 01-92 (Oct. 24, 2008).

[92] As NECA and other have consistently pointed out, small rural carriers are at a substantial disadvantage getting carriers to the negotiating table, let alone concluding a fair agreement, due to their limited bargaining power. *See infra,* pp. 39-40.

recovery, which is likely under this proposal to place much larger demands for support on the proposed alternative recovery mechanism more quickly.

For all the above reasons, the Commission should refrain from attempting to classify all IP/PSTN services as "information services," but instead should confirm, as discussed above, that all providers of IP services dependent on North American Numbering Plan (NANP) numbers, who terminate local and long-distance interexchange telephone calls on the PSTN, are subject to the same reciprocal compensation and access charge obligations as any other service provider offering such services.

IV. IMPLEMENTATION ISSUES

A. Rate Reductions Should Occur Only After Rules Governing Alternative Cost Recovery Mechanisms Are In Place.

The Further Notice proposes dramatic changes in existing intercarrier compensation mechanisms, including a requirement that carriers reduce certain rates according to a rapid and firm timetable.[93] Carriers would be permitted to offset these revenue reductions, to some extent, via increases in federal SLCs. In addition, ILECs may be able to obtain additional Universal Service support that takes into consideration a variety of factors not previously considered in determining existing Universal Service

[93] Specifically, if the FCC were to adopt the proposals outlined in Appendix A or C, all LECs would be required to reduce their terminating intrastate switched access rates by 50 percent of the difference between their intrastate switched access rates and their interstate switched access rates one year from the effective date of the Commission's Order. Two years from the Order's effective date, all LECs must reduce their terminating intrastate switched access rates by the remaining 50 percent of the difference between their intrastate switched access rates and their interstate switched access rates, so that their intrastate rates equal their interstate rates. Carriers are expected to comply with state tariffing requirements or other applicable state law in effectuating those changes in intrastate terminating access rates.

support.[94] The *Further Notice* does not propose specific rules governing additional support funding, however, and it is unclear when such rules would be promulgated.

NECA believes the FCC should not establish specific dates for rate reductions or other changes in existing intercarrier compensation and USF mechanisms until a reasonable time after specific rules are adopted implementing reform concepts. In particular, carriers should not be expected to implement intrastate rate reductions until specific rules governing alternative cost recovery are in place and considered final.

In implementing the MAG plan reforms, for example, the Commission was careful to establish specific rules governing data reporting and true-up procedures for the new ICLS mechanism *prior* to the phase-out of carrier common line charges from carrier tariffs. This cautious approach was appropriate, as there were complex interrelationships between the proposed new support mechanism and various reporting timetables for data needed to implement ICLS.[95]

The process of implementing the rate reductions and alternative support mechanisms described in the *Further Notice* is likely to be far more complex. While it is certainly possible final rules governing these mechanisms can be published and become final prior to the time-mandated rate reductions occur, this is far from a certainty. Therefore, the Commission should establish dates for scheduled rate reductions based on

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[94] Under the amended proposal set forth in Appendix C to the *Further Notice*, existing USF support would remain available for RoR ILECs during the first two years of the transition plan. As rates are reduced, proposed SLC increases would occur and new capped supplemental ICLS2 support would be available to RoR ILECs, but no specific rules are proposed governing the process for receiving such support. As noted above (*see supra* n. 59), it is questionable whether amounts available under such capped mechanisms will be sufficient, and it is not clear how such support amounts would be allocated between companies, jurisdictions and services.

[95] Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, CC Docket No. 00-256, *Second Report and Order and Further Notice of Proposed Rulemaking*, 16 FCC Rcd 19613 (2001), at ¶ 301 (*MAG Order*).

the date actual rules become final (*e.g.*, "one year from the effective date of the *Order*, or six months from the date rules incorporating ICC reform measures become final, whichever occurs later.")

B. The Commission Should Consider the Need to Maintain Tariff-Based Structures for RoR Carriers.

The *Further Notice* proposes to move all intercarrier compensation to reciprocal compensation arrangements in three years. A regime based solely on negotiated agreements would, however, place enormous strain on the resources of small rural ILECs. Even larger carriers may find this timetable difficult to achieve. As Qwest recently pointed out, for example, '[i]t would be unrealistic and contrary to the public interest to open the massive switched access tariffs to contract negotiations." [96]

Small rural ILECs rely heavily on filed tariffs to establish their rates and provide legal recourse for enforcement of rates and collections, as well as technical service descriptions. The Commission has appropriately acknowledged that "[w]e cannot and should not expect a telephone company with eight employees to do everything that Pacific Telephone is expected to do."[97] Many rural companies simply do not have the resources to negotiate and arbitrate agreements with hundred of other carriers.

Even more so in today's environment, with significantly more service providers, small companies often find themselves without the resources or leverage to negotiate fair interconnection agreements with larger carriers, who typically refuse to consider

[96] Letter from Melissa E. Newman, Qwest, to Marlene H. Dortch, FCC, CC Docket Nos. 01-92, 99-68, and WC Docket Nos. 05-337, 07-135 and 06-122 (Oct 27, 2008), at 7. Qwest accordingly asks the Commission to ensure that any new uniform terminating rate applicable to terminating switched access traffic remain in applicable state and federal access tariffs (and not necessarily specified in interconnection agreements).

[97] *In the Matter of MTS and WATS Market Structure*, CC Docket No. 78-72, Phase I, Third Report and Order, 93 FCC 2d 241 (1983), at ¶ 362.

reasonable modifications to standard agreements. Smaller carriers, who individually terminate small amounts of traffic but collectively impose significant terminating traffic loads on small company networks, often simply refuse to negotiate at all.[98] As a result, rural ILECs in many instances are forced to terminate traffic without any compensation.[99] A system basing all intercarrier compensation on negotiated agreements would thus place enormous strains on small rural ILECs and leave them vulnerable to unfair and unreasonable terms or to receiving no compensation at all.

The Commission may reasonably conclude, therefore, that tariff arrangements provide the most reasonable and efficient solution for these carriers. At a minimum, the Commission should consider using federal tariffs as the mechanism for implementing default intercarrier compensation arrangements as this will minimize transaction costs.[100] Tariffs provide for substantial flexibility in setting rates that reflect costs and can accommodate the needs of similarly-situated groups of customers and carriers.[101]

Finally, many carriers continue to need the ability to participate in common revenue pooling arrangements similar to those administered by NECA today.[102] Revenue pooling provides substantial administrative savings and risk-sharing benefits, and can be adapted for use under tariffs, certain types of common contracts, or some combination of

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[98] Often these situations involve traffic that transits another ILEC's network, but originates from a carrier with whom the terminating RLEC does not have a direct relationship.

[99] Wireless carriers, in particular, often take the position that without an agreement, traffic should be treated as "bill and keep." *See* Letter from Joe A. Douglas, NECA to Marlene H. Dortch, FCC, CC Docket No. 01-92 (Mar. 27, 2008), presentation, at 8.

[100] *E.g.,*USTelecom Comments, CC Docket No. 01-92 (May 23, 2005), at 44.

[101] Rate banding techniques used in NECA's access tariff provide an example of a pricing approach that permits groups of ILECs with similar cost characteristics to charge rates reflecting those costs. In addition to rate banding techniques, NECA's existing tariffs include several discount pricing arrangements that also more closely align rates with costs. *See, e.g.*, *Description and Justification*, Tariff FCC No. 5, Transmittal No. 1214, Volume 5, Section 3 (June 16, 2008).

[102] *See* Rural Alliance Comments, CC Docket No. 01-92 (May 23, 2005), at 135-138.

the two mechanisms. Regardless of whether intercarrier compensation rates, terms and conditions are set by tariff, contract, or some combination of the two, RoR carriers should continue to have the option of participating in voluntary tariff and revenue pooling arrangements. NECA has in-place systems and resources that can readily be adapted to changes in the Commission's rules governing intercarrier compensation mechanisms.[103] As the Commission considers potential ways to implement ICC reform going forward, NECA will be pleased to assist the Commission in developing specific rules and procedures to govern voluntary tariff and pooling arrangements in ways that meet the needs of member companies and the Commission.

C. USF Contribution Reform Should Encompass Broadband Services and Follow a Consistent Approach for All Funding Mechanisms.

The *Further Notice* proposes replacing today's revenues-based USF contribution system with a telephone numbers-based methodology under which contributors will pay a constant, flat-rate assessment based on telephone numbers and/or connections.

Under the approach set forth in Appendices A & C, the per-number assessment would apply to residential subscribers at the fixed rate of $1.00 per number per month, and the Commission would seek comment on methods to implement connections-based assessments on business services. Under the approach set forth in Appendix B, the per-number rate for residential subscribers would be $0.85 per month, and business services would pay $5.00 per month for each dedicated connection with transmission capability of up to 64 kbps, and $35.00 per month for each dedicated connection with speeds over 64 kbps.

[103] A key requirement in this regard is a consistent set of rules that would continue to apply to revenue and cost determinations, with appropriate regulatory oversight.

In prior comments, NECA has pointed out that, while overall demand for interstate telecommunications and information services remains strong, end-user switched interstate telecommunications revenues, on which current contributions are based, are generally declining.[104] Demand is shifting to "bundled" service packages and/or broadband services that replace to some extent traditional interstate telephony services (*e.g.*, voice mail, instant messaging, web-based services, etc.). Customers are increasingly subscribing to telecommunications services, including voice telephony, provided as part of an advanced broadband service package (e.g., "triple play" packages).

The Commission needs to ensure USF assessments keep pace with the market. Thus, any action taken with respect to USF contribution reform should have the goal of making the contribution base as broad as possible. As demand continues to migrate to broadband services, expansion of the contribution base becomes more and more critical to maintaining the stability of the overall fund. Specifically, all broadband connections, regardless of technology used (e.g., DSL, cable modem) or regulatory status (Title I or Title II) should be included in the contribution base to make it as broad as possible.[105]

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[104] NECA Comments, CC Docket No. 96-45 and WC Docket No. 05-337 (Apr. 17, 2008), at 34.

[105] NECA has previously pointed out existing disparities between contribution requirements from broadband services provided on a Title II basis and those provided under Title I as permitted by the Commission's Wireline Broadband Order. *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, *Universal Service Obligations of Broadband Providers, Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, CC Docket Nos. 95-20 and 98-10, *Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises*, WC Docket No. 02-242, *Consumer Protection in the Broadband Era*, WC Docket No. 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005), at ¶ 113. This non-level playing field should be corrected, preferably by expanding the contribution base to encompass all broadband service providers.

Finally, if the Commission does adopt a new USF contribution mechanism it should assure Telecommunications Relay Services (TRS) and other programs use a consistent methodology. In this regard, the *Further Notice* appears to reject proposals by AT&T and Verizon to transition the Telecommunications Relay Services Fund, local number portability cost recovery, and numbering administration to a numbers/connections-based assessment methodology.[106] By declining to include these programs in a revised contribution mechanism, the Commission will likely increase the administrative costs associated with these programs. In the interest of keeping costs low, NECA therefore recommends the Commission maintain consistent methods for collecting USF contributions for all programs currently covered by Form 499-A.

V. CONCLUSION

The Commission should take prompt action on the "growing consensus" items outlined in the Joint Statement of Commissioners Copps, Adelstein, Tate and McDowell. These reforms, which could be accomplished by the Commission before the end of the year, would resolve interstate and intrastate access arbitrage problems, provide for alternative cost recovery for RoR companies without unduly burdening consumers, address phantom traffic, access pumping, and access avoidance problems, effectively encourage carriers to deploy broadband services throughout their service territories, and eliminate the current irrational "identical support" rule for CETC universal service payments.

NECA strongly suggests the Commission refer consideration of how to unify access charges and reciprocal compensation rates to a later proceeding. In crafting

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[106] *Further Notice,* Appendix A, n. 373, *citing* Letter from Mary L. Henze, AT&T and Kathleen Grillo, Verizon , WC Docket No. 06-122 and CC Docket No. 96-45 (Oct. 20, 2008), at 6.

further proposals for reform, it is critical the Commission design interconnection, intercarrier compensation and universal service rules that reflect the needs of the multi-service, all-packet broadband networks provided by rural companies. Much of the PSTN network today is already converted, or in the process of being converted, to packet technology, and intercarrier compensation and universal services structures must reflect this new reality.

Other proposals set forth in the *Further Notice*, such as study-area specific freezes on Universal Service support, reverse auctions, a new untested "additional costs" pricing standard, and the incorrect and unsupported classification of all IP/PSTN services as "information services," would only lead to regulatory chaos, not reform, and should not be adopted.

The Commission should establish implementation dates for reform proposals based on dates actual rule language becomes final. The Commission should also consider ways to permit small RoR carriers to continue using voluntary tariff and pooling arrangements under new ICC mechanisms. Finally, if the Commission adopts a numbers or connections-based mechanism for USF contributions, it should seek to apply this mechanism across the broadest possible base including broadband services, and in a consistent manner for all funding mechanisms, including the interstate TRS fund.

Respectfully submitted,

NATIONAL EXCHANGE
CARRIER ASSOCIATION, Inc.

November 26, 2008

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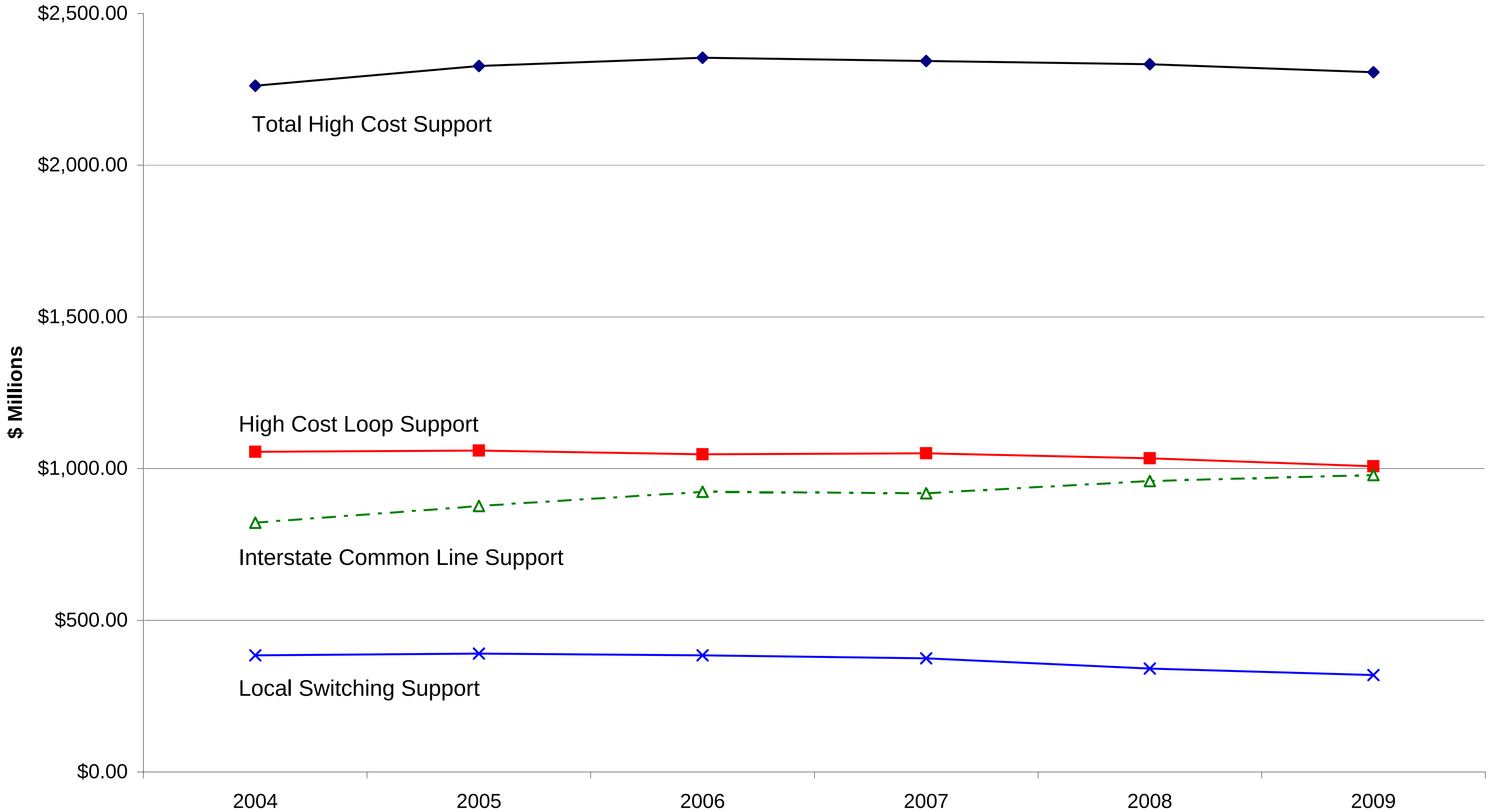
Rural ILEC High Cost Support



ICLS for 2004 includes Long Term Support totaling $195.53M
ICLS and LSS for 2007 forward are subject to true-up.

Source: USAC Quarterly Submissions

CERTIFICATE OF SERVICE

I hereby certify that a copy of NECA's Comments was served this 26th day of November 2008, by electronic filing and e-mail to the persons listed below.

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